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IN THE

SUPREME COURT OF THE UNITED STATES.

No. 659. October Term, 1933.

THE UNITED STATES OF AMERICA,
Appellant,

v.

BYRUM GIBSON and CLAUDE CHAMBERS.

On Appeal from the District Court of the United States for the Middle District of North Carolina.

BRIEF FOR DEFENDANTS-APPELLEES.

OPINION BELOW.

The opinion of the District Court may be found on R., p. 7.

JURISDICTION.

The judgment to be reviewed was entered December 6, 1933 (R., pp. 10 & 11), and the petition for appeal to this

Court was allowed December 12, 1933 (R., p. 11). The jurisdiction of this Court rests upon the provisions of the Criminal Appeals Act of March 2, 1907, c. 2564, 34 Stat. 1246 (U. S. C., Title 18, Sec. 682), and Section 238 of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Was the District Court of the United States for the Middle District of North Carolina on December 6th, 1933, and thereafter, without jurisdiction and power to hear and determine cases involving the violation of the National Prohibition Act and conspiracy to violate said act, as amended and supplemented and to impose sentences for violation of said act, for the reason that the powers of Congress to enact such legislation, insofar as applicable to the Forty-eight states, under the Eighteenth Amendment of the Constitution of the United States was taken away by the people by the adoption of the Twenty-first Amendment to the Constitution of the United States?

CONSTITUTIONAL PROVISIONS INVOLVED.

AMENDMENT XVIII.

1. After one year from the ratification of this article, the manufacture, sale or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof, for beverage purposes, is hereby prohibited.

2. The congress and the several states shall have concurrent power to enforce this article by appropriate legislation.

3. This article shall be inoperative unless it shall have been ratified as an amendment to the constitution by the legislatures of the several states, as provided in the constitution, within seven years from the date of the submission hereof to the states by the congress.

AMENDMENT XXI.

Article XXI of the Amendments to the Constitution was adopted on December 5, 1933, and provides:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:

"ARTICLE ——

"SECTION 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"SEC. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"SEC. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

ARGUMENT.

1.

ON DECEMBER 6th, 1933, THE DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA HAD NO JURISDICTION OF THE SUBJECT-MATTER CONTAINED IN THE INDICTMENTS AGAINST THE DEFENDANTS.

The National Prohibition Act and the Amendments thereto were enacted by Congress under the power granted to it through the Eighteenth Amendment to the Constitution of the United States. It must be conceded that Congress could not have passed the National Prohibition Act and the Amendments thereto except by reason of the power given to it by the Eighteenth Amendment to the Constitution of the United States. Congress can only enact such legislation as may be delegated to it by the Constitution of the United States and its Amendments.

On the 5th day of December, 1933, the President of the United States and the Secretary of State proclaimed the adoption of Amendment Number Twenty-One. Therefore, it was the duty of the presiding Judge of the District Court to take judicial notice that the Twenty-First Amendment was consummated on December 5th, 1933. *Dillon v. Gloss*, 256 U. S. 368.

Therefore, the Court was confronted with the situation of having in its Court the defendants who were indicted under the National Prohibition Act, but who had not been sentenced, which was passed pursuant to the powers given to Congress by the Eighteenth Amendment when the

Eighteenth Amendment was specifically and directly repealed by the Twenty-First Amendment to the Constitution of the United States. Could the Court proceed to judgment against the defendants when they were indicted under a law passed pursuant to an Amendment to the Constitution of the United States when that Amendment had been unqualifiedly repealed without a saving clause?

In order for the Court to proceed to judgment against a defendant in any criminal case, it must have jurisdiction first of the subject-matter; and, second, of the person whose rights are to be passed upon.

In *Cooley on Constitutional Limitations,* Fifth Edition, 493, it is said:

> "The proceedings in any court are void if it wants jurisdiction of the case in which it has assumed to act. Jurisdiction is, first, of the subject-matter; and, second, of the persons whose rights are to be passed upon.
>
> A court has jurisdiction of any subject-matter, if, by the law of its organization, it has authority to take cognizance of, try, and determine cases of that description. If it assumes to act in a case over which the law does not give it authority, the proceeding and judgment will be altogether void, and rights of property cannot be divested by means of them.
>
> Accordingly, where a court by law has no jurisdiction of the subject-matter of a controversy, a party whose rights are sought to be affected by it is at liberty to repudiate its proceedings and refuse to be bound by them, notwithstanding he may once have consented to its action, either by voluntarily commencing the proceeding as plaintiff, or as defendant by appearing and pleading to the merits, or by any other formal or informal action."

The subject-matter in the case at bar was a violation of the National Prohibition Act and Amendments thereto and when the provision of the Constitution pursuant to which the National Prohibition Act was passed was repealed, the subject-matter of the controversy and of the charge against the defendants ceased to exist and there was nothing for the District Court to do but to take cognizanee of that fact and dismiss the indictments and discharge the defendants. The subject-matter necessary to give the Court jurisdiction had ceased to exist.

In *Ex Parte McCardle,* 74 U. S. 506, a case in which the appellate jurisdiction of the United States Supreme Court in certain cases was taken away while a case was pending, Chief Justice Chase said:

> "What, then, is the effect of a repealing act upon the case before us? We cannot doubt as to this. Without jurisdiction the Court cannot proceed at all in any cause. Jurisdiction is power to declare the law and when it ceases to exist, the only function remaining to the Court is that of announcing the fact and dismissing the cause. And this is not less clear upon authority than upon principle."

It is elementary that the Constitution itself never yields to treaties or enactments of Congress and where they conflict the Constitution must prevail. Therefore, the National Prohibition Act has no force or effect save and except that which it derives from the Eighteenth Amendment and when the Eighteenth Amendment was repealed, all acts of Congress based upon the Eighteenth Amendment likewise ceased to exist insofar as the Forty-eight states are concerned.

It is the universally recognized rule of American and

English jurisprudence that the repeal of a criminal law before final judgment has been rendered deprives courts of power to proceed to judgment in pending criminal cases, unless there is a saving clause in the law. *Green v. United States of America,* in the United States Circuit Court of Appeals for the Ninth Circuit, decided December 14th, 1933; *Smallwood v. U. S. A.,* in the United States Circuit Court of Appeals for the Fifth Circuit, decided December 19th, 1933; *Gulf, Colorado, & Santa Fe Railway Company v. Dennis,* 224 U. S. 503; *Yeaton v. U. S.,* 5 Cranch 251; 36 Cyc. 1224; *Hartung v. People,* 22 N. Y. 95; *State v. Norwood,* 12 Md. 195; *Cooley's Constitutional Limitations,* Sixth Edition, 469; 2 *Sutherland Stat. Constr.,* Second Edition, #286; *Hollingsworth v. Va.,* 3 Dall. 378.

It is also a well-recognized rule of decision that when during the pendency in an appellate court of a criminal case, the law is changed and the statute creating the crime charged is repealed without any saving clause, the appellate court must dispose of the case under the law in force when its decision is rendered. *State v. Norwood,* 12 Md. 195; *Cooley's Constitutional Limitations,* Fifth Edition, 471; *Yeaton v. U. S.,* 5 Cranch 281; *U. S. v. Tynen,* 78 U. S. 88; *State v. Williams,* 97 N. C. 455; *State v. Long,* 78 N. C. 572; also *State v. Perkins,* 141 N. C. 797, and reported in 9 L. R. A. (N. S.) 165.

In the case of *U. S. v. Tynen, supra,* Mr. Justice Fields said:

> "By the repeal of the 13th section of the Act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offense be at the time in existence. By the repeal the legislative will is expressed that no further proceed-

ings be had under the Act repealed. In NORRIS v. CROCKER the Court said that, as the plaintiff's right to recover in that case depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject. As said by Mr. Justice Taney, in another case: 'The repeal of the law imposing the penalty is of itself a remission.' ''

In the case of *Gulf, Colorado, & Santa Fe Railway Company v. Dennis, supra,* in which the court cited criminal cases, including those heretofore cited in this Brief, in which the rule was applied, Mr. Justice Van Devanter said:

> "These questions may not be directly answered by the prior decisions of this court, but their right solution is more than suggested by the well-recognized rule of decision that when, during the pendency in an appellate court of an action for a penalty, civil or criminal, the statute prescribing the penalty is repealed, without any saving clause, the appellant court must dispose of the case under the law in force when its decision is given, even although to do so requires the reversal of a judgment which was right when rendered."

In *Yeaton v. U. S.,* 5 Cranch 281, an admiralty case, which was pending on appeal, and the Act under which the condemnation was declared was repealed, the Court held that the cause must be considered as if no sentence had been pronounced.

The Court held in an opinion by Chief Justice Marshall that the cause must be considered as if no sentence had been pronounced; and if no sentence had been pronounced, then, after the expiration or repeal of the law, no penalty

could be enforced or punishment inflicted for a violation of the law committed while it was in force, unless some express provision of statute was made for that purpose.

In *Wade v. St. Mary's Industrial Company*, 43 Md. 178, it was held that:

> "It is a settled doctrine that courts, in deciding questions arising before them, will look to the law as it is at the time, and are not to be governed by what it may have been—unless proceedings under a prior existing law had been complete or rights had become vested. This principle has been held to apply as well to cases before an appellate court as to those that are pending in courts of original jurisdiction."

In 36 Cyc. 1224, the following statement of law appears:

> "The general rule against the retrospective construction of statutes does not apply to repealing acts, and in the absence of a saving clause, or other clear expression of intention, the repeal of a statute has the effect of blotting it out as completely as if it had never existed and of putting an end to all proceedings under it."

In *White v. Clark*, 11 U. C. Q. B. 137, in which Tyndal, Chief Justice, says that the effect of repealing a statute is

> "to obliterate the statute repealed as completely from the records of Parliament, as if it had never passed, and that it must be considered as a law that never existed, except for the purpose of those acts or suits which were commenced, prosecuted, and concluded while it was an existing law."

In support of the argument that when a constitutional amendment is adopted it is effective immediately and courts no longer have jurisdiction of the subject-matter, we find in *Hollingsworth v. Va., supra,* in the argument of the Attorney-General, the following:

> "From the moment those who gave the power to sue a state, revoked and annulled it, the power ceased to be a part of the constitution; and if it does not exist there, it cannot in any degree be found, or exercised, elsewhere. The policy and rules, which in relation to ordinary acts of legislation, declare that no *ex post facto* laws shall be passed, do not apply to the formation, or amendment, of a constitution. The people limit and restrain the power of the legislation, acting under a delegated authority; but they impose no restraint upon themselves. * * * On general ground, then, it was in the power of the people to annihilate the whole, and the question is, whether they have annihilated a part of the judicial authority of the United States? * * * And the case of amendments is evidently a substantive act, unconnected with the ordinary business of legislation, and not within the policy, or terms, of investing the President with a qualified negative on the acts and regulations of Congress. * * * There can be no amendment of the Constitution, indeed, which may not, in some respect, be called *ex post facto;* but the moment it is adopted, the power it gives, or takes away, begins to operate, or ceases to exist."

It is fundamental law that the Federal Government is one of delegated powers. These powers appear and are contained in the Constitution of the United States, which is the fundamental law of the land. Unless some power appears in and is granted to the Federal Government by

the United States Constitution, no branch of the Federal Government can act with regard to any subject. In any given case, in order to ascertain whether or not a United States court has authority to entertain jurisdiction over and consider a case before it, we must look to that instrument granting the power to entertain such jurisdiction, the Constitution. This theory of the scheme and plan of the Federal Government has been accepted from the earliest times.

Where an Act of Congress conflicts with the Constitution of the United States, the fundamental law must govern and the statute fall. *Federalist No. LXXVIII.*

In the reference to the Federalist above cited will be found one of the earliest expressions of the theory and scheme of the Federal Government expressly stating that the judicial department of the United States, in considering causes before it, must turn first to the Constitution in order to ascertain what determination to make in a given case. Unless authority is granted by the Constitution to the Federal Government to act with regard to a subject-matter, no branch of the Federal Government has any right to act, whether it be the executive, legislative, or judicial. This rule of law is so firmly established that to cite authorities seems to be superfluous. However, the rule has been stated in such clear and illuminating language that it seems proper to look to a few of the adjudicated cases for this expression of the rule.

> "It may be regarded as settled that the Constitution of the United States is the only source of power authorizing action by any branch of the Federal Government." *Dorr, et al., v. United States,* 195 U. S. 138.

The Federal courts have frequently refused to entertain jurisdiction over a cause because power was not

granted by the Constitution to consider the subject-matter involved.

The case of *United States v. Hudson, et al.*, 7 Cranch, 32, involved a prosecution for libel against the Government of the United States. The only question presented was whether the Circuit Courts of the United States could exercise a common law jurisdiction in criminal cases. The question was answered by the court in the negative, as follows:

> "The course of reasoning which leads to this conclusion is simple, obvious, and admits of but little illustration. The powers of the general Government are made up of concessions from the several states; whatever is not expressly given to the former, the latter expressly reserve. The judicial power of the United States is a consistent part of those concessions; that power is to be exercised by courts organized for the purpose, and brought into existence by an effort of the legislative power of the Union."

It was then held that Federal courts could not entertain jurisdiction over the cause for the reason that no power authorizing such jurisdiction appeared in the Constitution.

Again, in *Ex Parte Farley*, 40 Federal, 66, it appeared that Farley and Wilson were indicted by a Federal grand jury impaneled by the United States for the Indian territory for the crime of larceny. They were tried, convicted and sentenced. The accused then petitioned for writs of *habeas corpus* on the ground that they were unlawfully restrained of their liberty contrary to the Constitution and laws of the United States, because the indictment was found by a grand jury impaneled without authority of law. The question presented to the court, then, was whether the court at Muskogee had power to impanel a grand jury, for if it

had no such power, the grand jury that found the indictment was an illegal body and the defendants were improperly indicted. In the course of its opinion the court said, at page 69:

> "All courts of the United States, whether they be the supreme court of the United States, circuit courts, district courts, United States territorial courts in the territories, or the court for the Indian Territory, established by the act of March 1, 1889, are creatures of the constitution, and the statutes passed in pursuance thereof, and they have only such jurisdictional powers as are conferred by the constitution or by statute."

An examinaton of the Constitution of the United States and of the Acts of Congress passed pursuant thereto disclosed no authority granted to United States courts in Indian territories to impanel grand juries in criminal cases, and the court held that in the absence of such authority the defendants were improperly indicted and convicted, and must be discharged.

Where a Federal court has no jurisdiction of the case, it has no power to make any order in it except to dismiss it for want of jurisdiction. *Fisk v. Union Pacific Railway Company, et al.*, 9 Federal Cases, No. 4827.

If an Act of Congress conflicts with the United States Constitution, it must be declared to be unconstitutional, for it can have no legal existence unless authority for it is found in the Constitution. This rule was declared by Chief Justice Marshall in the case of *Hodgson, et al., v. Bowerbank, et al.*, 5 Cranch, 303, where the pleadings in a cause described the plaintiffs as being "aliens and subjects of the king of the United Kingdom of Great Britain

and Ireland" and the defendants were described as "late of the district of Maryland, merchants." It was contended on the one hand that the courts of the United States had no jurisdiction over the cause, it not being stated that the defendants were citizens of any state. On the other hand, it was contended that the judiciary act gave jurisdiction to the circuit courts in all suits in which an alien is a party. Chief Justice Marshall, in a brief opinion, stated:

> "Turn to the article of the constitution of the United States, *for the statute cannot extend the jurisdiction beyond the limits of the constitution.*" (Italics supplied.)
>
> "The words of the constitution were found to be 'between a state, or the citizens thereof, and foreign states, citizens, or subjects.' "

The court stated the objection was fatal and the Federal courts could not entertain jurisdiction over the action. Here, then, is a case in which there was a direct conflict between the provisions of an act of Congress and the provisions of the Constitution. The judiciary act granted to the circuit courts jurisdiction over all causes in which an alien was a party. On the other hand, the Constitution granted jurisdiction to Federal courts in causes between states or citizens thereof and foreign states, citizens or subjects. The pleadings disclosed that the plaintiffs were aliens but did not disclose that the defendants were citizens of any state. The Constitution being the fundamental law of the land, and having defined the jurisdiction of the Federal courts, no act of Congress could extend that jurisdiction.

> "The decisions, above referred to, proceed upon the ground, that the general government itself is one

of limited powers, and hence possesses no authority to punish conduct, beyond what is expressly granted to it, or is necessary and proper to carry into effect what is expressly granted. That it hence follows, no conduct can be declared a crime by congress, which does not come within such power." *U. S. v. New Bedford Bridge,* 27 Federal Cases, 15867, page 102.

The question is one of jurisdiction over the subject-matter. There must be a valid and subsisting law of the United States in existence empowering the court to take cognizance of the case at the time judicial action is invoked. As a result of the adoption of the Twenty-first Amendment, and beginning with December 5, 1933, all power which had been granted by the Eighteenth Amendment was revoked, and with respect to the instant case, the situation stood as if the Eighteenth Amendment had never been enacted. Congress was, as of December 5, 1933, without power to concern itself with the possession and transportation of liquor within the State of North Carolina. The matter of defining crimes and punishing criminals in that field then belonged to the State of North Carolina. Therefore, if the District Court of the United States for the Middle District of North Carolina possessed the power and authority to try and dispose of the instant case, it was because of the existence of some legislation continuing in force the provisions of the National Prohibition Act and Section 37 of the Criminal Code penalizing a conspiracy to commit an offense against the United States, the effect of which is to confer or continue jurisdiction in the District Court by a statute after all authority in Congress to legislate in that field had become inoperative.

If any Federal court lacks the authority to proceed in a cause by reason of the absence of a constitutional

grant of power, all Federal courts must likewise lack such power. Therefore, where an appeal from a judgment involving violations of the National Prohibition Act, or of conspiracy to violate the National Prohibition Act, is pending in any Federal appellate court, that court can do but one thing; that is, remand the case with directions to dismiss it. No other order affirming or disaffirming the judgment of the lower court can be entered, for to make such an order would be to give life to a dead statute which has no constitutional authority. To make such an order, authority must be present not in the statutes of the United States but in the Constitution, and if no such authority is found in the Constitution, the courts have no power to make or execute the order.

In order to give jurisdiction to a Federal Court in any case whatever, the Constitution and the statute law must concur. It is not sufficient that the jurisdiction may be found in the Constitution or the law, the two must cooperate: the Constitution as the fountain and the laws of Congress as the streams through which the waters of jurisdiction flow to the Court. This results necessarily from the structure of the Federal government. It is a government of granted and limited powers. *U. S. v. Brooklyn Ferry Co.*, 21 Fed. 331; *In Re Barry*, 42 Fed. 113; *In Re Metzger*, 17 Fed. cases, No. 9511.

Although it is necessary for the constitution and the law to concur in order to give jurisdiction, the government insists in the instant case that the defendants should be punished although the life and vitality which gave the Court jurisdiction of the subject-matter has ceased to exist and is now constitutionally and legally dead.

2.

SECTION 13 IS NOT APPLICABLE TO THE FACTS IN THIS CASE FOR THE REASON THAT A CONSTITUTIONAL AMENDMENT IS HERE INVOLVED, AND FOR THE ADDITIONAL REASON THAT THE NATIONAL PROHIBITION ACT HAS NOT BEEN REPEALED BUT ONLY RENDERED OBSOLETE AND INOPERATIVE IN THE FORTY-EIGHT STATES.

Section 13 of the Revised Statutes (U. S. C., title 1, Section 29) provides:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

The government admits that if it were not for Section 13 of the Revised Statutes that it would be conceded that the ruling of the court below was correct. The government contends that Section 13 of the Revised Statutes, which is called by the government the "principle of statutory construction," required that the defendants be sentenced, even though the law under which they were indicted had been repealed.

It should be conceded in this case that if the National Prohibition Act had been repealed by an Act of Congress and had not been rendered obsolete by virtue of the Twenty-

first Amendment, that Section 13 of the Revised Statutes would have permitted the Court to proceed to judgment. But that statute applies only to a statute repealed by an act of Congress and could not apply to an Act which had been rendered obsolete by a Constitutional Amendment for the reason that the repeal of the Eighteenth Amendment having taken away the power of Congress to legislate on the subject of prohibition, and there being no saving clause in the Twenty-first Amendment to the Constitution, therefore Section 13 is not applicable where the legislation has been rendered obsolete, not by the repeal of the legislation by a legislative body having authority to enact the legislation, but by it being rendered inoperative by virtue of a Constitutional Amendment to the Constitution of the United States, which repealed the Amendment authorizing the particular legislation and withdrawing the authority to legislate at all on that subject. In such a situation Congress would be powerless to enact a saving clause either before or after such legislation has been nullified, unless the saving clause was contained in the proposed Amendment, and therefore Section 13 would be inapplicable to a penal statute rendered inoperative.

It is admitted that Section 13 applies only to an act which has been repealed. Section 13 is not applicable to the case at bar for the reason that the National Prohibition Act has not been repealed but has been rendered inoperative and obsolete insofar as the Forty-eight states are concerned.

Therefore, we are confronted with a situation like that in *Moore v. U. S.*, 85 Fed. 465, where the act for which the defendant was tried was still a crime, but as applicable to him it no longer existed. It had not been repealed, as it still was in force in the other territories and possessions of the United States. But by virtue of the fact that no provision had been made continuing the act under consid-

eration and no transfer of jurisdiction from the territorial court to the Circuit Court had been provided, the Circuit Court of Appeals held that no punishment could be inflicted for its violation then for the reason that the law had expired insofar as the State of Utah was concerned.

It will be observed that in *Yeaton v. U. S.*, 5 Cranch, 281, which was cited in the Moore case, Chief Justice John Marshall intimated that in reference to a law that no longer existed, it might be rendered inoperative as to a person either by *expiration or the repeal of the law.*

In the case of *Moore v. U. S., supra,* after quoting Section 13 of the Revised Statutes, the Court said:

> "It is clear from the language of the Section that it applies only to cases where the statute defining an offense has been REPEALED. The Act of July 2nd was not repealed by the enabling act, for it yet applied to the territories of the United States."

In *Yeaton v. U. S.*, 5 Cranch, 281, Chief Justice John Marshall said:

> "It has been long settled on general principles that, AFTER THE EXPIRATION OR REPEAL OF A LAW, no penalty can be enforced nor punishment inflicted for violations of the law committed while it was in force, unless some express provision be made for that purpose by statute."

The appellees contend that the National Prohibition Act has not been repealed, but has only been rendered obsolete as to the Forty-eight states for it yet applies to the District of Columbia, Alaska, Hawaii, and the other possessions of the United States.

If an act is repealed in any case as far as the act itself is concerned, it is dead. That the National Prohibition is not repealed and still applicable to the District of Columbia, Alaska, Hawaii and the other possessions of the United States, we have a statement by Honorable Homer S. Cummings, now Attorney-General of the United States, who, on December 2, 1933, among other things, it was stated:

> "7. Effective permit bonds given under the provisions of Regulations 2, covering tax-paid liquors, shall be terminated as to future liability as of the date the Eighteenth Amendment is repealed, except in the District of Columbia, Alaska, Hawaii, and such other possessions and territories wherein the National Prohibition Act is regarded as remaining in force after repeal of the Eighteenth Amendment."

The above being Section 7 of a bulletin issued by the Treasury Department, dated December 2, 1933.

Another reason that Section 13 is inapplicable to the points presented in this case is that in no view can a constitutional amendment be termed a Congressional enactment or a statute. If the construction is given Section 13 as desired by the government it would in effect be broadening that section to the extent that Congress could pass an Act directing how the judiciary would be forced to construe a constitutional amendment.

It is not necessary to state that Congress could not pass an act which would bind this Court as to the rules that it would have to apply in construing the Constitution or any amendments thereto.

To declare what the law is, or has been, is a judicial power. That the judiciary is the final authority in the

construction of the Constitution and the laws is too well founded to need any citation of authorities.

A further reason why Section 13 is inapplicable to the effects of a constitutional amendment is observed in that a proposal by Congress of a constitutional amendment does not partake of the ordinary class of legislation (a statute) for that it is not necessary that the president's approbation be received, as required by the Constitution, Article 1, Section 7, in the ordinary cases of legislation.

This point was made in *Hollingsworth v. Va.*, 3 Dall. 378, that the Eleventh Amendment was void for the reason that it was not submitted to the President for his approbation, but during the argument of the Attorney-General, Mr. Justice Chase interrupted to say:

> "There can, surely, be no necessity to answer that argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition or adoption of Amendments to the Constitution."

Therefore, a constitutional amendment is not a statute or a Congressional enactment, and if it is not, Section 13 could not be applicable.

Section 13 is just as inapplicable to the first count in the bill of indictment which charges a conspiracy to commit an "offense against the United States * * *," as defined by Section 37 of the Criminal Code, as it is to the second and third counts which charged a violation of the National Prohibition Act, to wit, the possession and transportation of liquor.

To constitute a criminal offense under Section 37, the object of the conspiracy must be to commit some offense against the United States; that is, to do some act made a crime by the laws thereof: *In re Wolf*, 27 F. 606, 610-611.

"The premise of these contentions is admitted. Since there are no common law offenses against the United States, the offenses mentioned in Section 37 of the Criminal Code must be statutory." *U. S. v. Haas*, 163 Fed. 908.

"In the light of the foregoing consideration, we think Section 37 of the Criminal Code was intended as a broad and comprehensive provision denouncing conspiracies to commit offenses created by any of the statutes of the United States as a crime." *Thomas v. U. S.*, 156 Fed. 897; *Ford v. U. S.*, 273 U. S. 593.

With the repeal of the Eighteenth Amendment the possession and transportation of liquor in North Carolina ceased to be an "offense against the United States."

One cannot be held for conspiracy to do an act which is not a crime. *Woo Wai v. United States*, 223 F. 412.

In the last cited case, at page 414, it was said:

"The facts as testified to by the defendants, and as supplemented by the evidence for the United States, fall short of showing that there was in fact a conspiracy to commit a criminal act within the meaning of section 5440 (Section 37, Criminal Code). It was the intention of the officers who induced Woo Wai and his associates to attempt to bring Chinese across the Mexican border that the law should not be violated. They intended to prevent the consummation of the offense which they lured the defendants to undertake. Their purpose was to intercept the Chinese so brought across the border, and return them to the country whence they came. Woo Wai and his associates, therefore, although they were not aware of that fact, were engaged in an act which was not to result in an accomplished offense against

the laws of the United States * * * If no violation of the law was to be accomplished by the act of the defendants, it follows that they could not be held for conspiracy to do that act."

Since the ratification of the 21st Amendment, there is no constitutional authority in Congress to legislate with respect to the transportation and possession of intoxicating liquor within a state. There can be no punishable conspiracy to violate a penal statute which has no support in the Constitution. *U. S. v. U. S. Brewers' Association*, 239 F. 163.

"The offenses provided for by the statute in question do not consist in the mere 'banding' or 'conspiring' of two or more persons together, but in their banding or conspiring with the intent, or for any of the purposes specified. To bring this case under the operation of the statute, therefore, it must appear that the right, the enjoyment of which the conspirators intend to hinder or prevent, was one granted or secured by the Constitution or laws of the United States. If it does not so appear, the criminal matter charged has not been made indictable by any Act of Congress.

We have in our political system a Government of the United States and a government of each of the several States. Each one of these governments is distinct from the others, and each has citizens of its own who owe it allegiance, and whose rights, within its jurisdiction, it must protect. The same person may be at the same time a citizen of the United States and a citizen of a State, but his rights of citizenship under one of these governments will be different from those he has under the other. Slaughter-House Cases, 16 Wall. 74, 21 L. ed. 408. * * * Circuit courts have no

common law jurisdiction of offenses of any grade or description; and it is equally clear that the appellate jurisdiction of the Supreme Court does not extend to any case or any question, in a case not within the jurisdiction of the subordinate Federal Courts. State v. Wheeling Bridge Co., 13 How. 563; U. S. v. Hudson, 7 Cranch, 32." *United States v. Cruikshank,* 92 U. S. 503, 548, 549, 564.

If the foregoing is not sound reasoning, we face the anomaly of acquitting the defendants for possessing and transporting liquor because with the effective date of the 21st Amendment, it was no longer a crime or an offense against the United States to transport or possess liquor wholly within a state and no conviction was possible for a conspiracy to do that which the law does not declare to be an offense or crime against the United States. Apparently the only adjudicated case holding that no conviction can be had upon an indictment for a conspiracy to violate the provisions of a statute which has been repealed, is *Powell, et al., v. People,* 5 Hun (N. Y.) 169, affirmed 63 N. Y. 88.

There is no need to point out the difference between a constitutional amendment and a statutory enactment. One is the voice of the people acting in their sovereign capacity, and the other the voice of the legislative branch of the government, to whom has been entrusted the exercise of powers of government by the people. In the cases cited in the Brief of the government in reference to Section 13 of the Revised Statutes, these cases hold that this section, when there is no saving clause, is to be read and construed as a part of all statutes subsequently repealed in order to give effect to the will and intent of Congress. It must be observed in the instant case that we are not dealing with the repeal of a statute in which it is necessary

to give effect to the will and intent of Congress, but on the contrary, we are dealing with the repeal of an Amendment to the Constitution of the United States by another Amendment and the latter Amendment should be given the effect that the people acting in their sovereign capacity desired and expected.

3.

THE TWENTY-FIRST AMENDMENT IS TO BE CONSTRUED IN REFERENCE TO THE KNOWN CONDITION OF AFFAIRS OUT OF WHICH THE OCCASION FOR ITS ADOPTION AROSE AND TO EFFECTUATE INSTANTLY THE SOLEMN ACT OF THE PEOPLE AS INDICATED IN THE ADOPTED AMENDMENT.

Aside from the decisions of the courts in reference to a situation as presented in this case, it seems that it would be useless and unwarranted to punish a person for the violation of a law that the majority of the people of these United States have decided that they no longer wanted. Indeed, it would be depriving a person of his liberty and property without due process of law and not by the "law of the land" for that the "law of the land" on December 6th, 1933, no longer contained that for which the defendants stood indicted before the District Court.

It is apparent from the overwhelming majority which the Twenty-First Amendment received that the condition of affairs out of which the occasion for its adoption arose was such that the people no longer desired prohibition as administered under the Eighteenth Amendment and the Acts of Congress passed pursuant thereto.

In the case of *Maxwell v. Dow,* 176 U. S. 580, Mr. Justice Peckham, speaking for the Court, said:

> "A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three-fourths of the states before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted."

Therefore, the defendants contend that the trial Court was without jurisdiction of the subject-matter or power to proceed to sentence the defendants on December 6th, for that the law on which they were indicted had been nullified by an overwhelming majority of the people of the United States and that it was the wish of the people that persons no longer be deprived of their liberty and property for the violation of the National Prohibition Act or its Amendments.

If it had been the intention of Congress in proposing the Twenty-first Amendment to the people to have wanted those who had violated the National Prohibition Act sentenced after the Twenty-first Amendment was adopted, it would have contained a saving clause that the violators of the National Prohibition Act prior to the adoption of the Twenty-First Amendment were to be punished and dealt with as if the Amendment had not been adopted.

It will be observed that the prohibitions of the Eighteenth Amendment did not become effective until one year

after its adoption and likewise it could have been proposed, if Congress had so desired, that all persons charged with violation of the National Prohibition Act prior to the adoption of the Twenty-First Amendment should be tried and sentenced until one year after its adoption.

As said by the presiding Judge in his opinion in this case (R., p. 7):

> "If the National Prohibition Act is still in force, Amendment XXI is denied immediate effect; it is postponed until all violations of the Prohibition Act, occurring before December 5, 1933, are finally disposed of by the Courts. Thus, the two Amendments would exist at the same time, notwithstanding that one repeals the other. The people granted the powers enumerated in Amendment XVIII, but they revoked those powers by Amendment XXI. The revocation occurred when the repeal was ratified. It was not repealed in part, but it was repealed in its entirety."

It will further be observed that in the instant case we are dealing with a constitutional amendment—an amendment that was adopted by the overwhelming majority of the people. The government, in its Brief, says:

> "The law which struck down and repealed the statute under which the respondents were indicted was a constitutional enactment, and this enactment of Congress, approved by the requisite number of states, became the supreme law of the land—a repealing act of the highest dignity."

Yet, it is insisted on behalf of the government that a citizen's liberty and property should be taken away from him at a time when the voice of the people have spoken and

the crime for which his liberty and property is now demanded no longer is a crime and the supreme law of the land. What good would be served, what principles of government would be maintained by depriving a person of his liberty and property for a crime that was only *malum prohibitum* and which became so obnoxious to the American people that it was wiped out in less than a year from the time the Amendment was proposed by Congress—although seven years was allowed for it to be approved. One of the suggestions why the defendants should now be sentenced and deprived of their liberty and property for the violation of this dead law is that some who violated it and have been punished will be unequally dealt with in comparison with the defendants. This argument on the part of the government that equality should be done to the violators of the National Prohibition law and that this court should waive aside the constitutional guaranties of a citizen and vested rights which they have in the law in order that all violators of the prohibition law should share equally is not persuasive when it requires this court to repudiate the long established principles of law in American and English jurisprudence. The government quotes the opinion of this Court in the recent case of *Funk v. U. S.*, in which the court said:

> "The public policy of one generation may not, under changed conditions, be the public policy of another."

We agree that this reasoning is very pertinent here and the repudiation of the Eighteenth Amendment by such a tremendous majority by the American people indicated that they no longer wanted National Prohibition, and that this Court should in passing upon the questions here presented give effect to the reasons in this country which

prompted the prompt enactment of the Twenty-first amendment. The expression of popular will has seen fit to declare dead the Eighteenth Amendment and the National Prohibition Act and its Amendments. The people have spoken in no uncertain terms. The voice of the people acting in their sovereign capacity have seen fit in their judgment to say that the offenses created by Congress pursuant to the powers directed to it by the Eighteenth Amendment are no longer to be construed as part of the law of the land. In Cooley on Constitutional Limitations, Fifth Edition, page 747, it is said:

> "Although by their constitutions the people have delegated the exercise of sovereign powers to the several departments, they have not thereby divested themselves of the sovereignty. They retain in their own hands, so far as they have thought it needful to do so, a power to control the governments they create, and the three departments are responsible to and subject to be ordered, directed, changed, or abolished by them. But this control and direction must be exercised in the legitimate mode previously agreed upon. The voice of the people, acting in their sovereign capacity, can be of legal force only when expressed at the times and under the conditions which they themselves have prescribed and pointed out by the constitution, or which, consistently with the constitution, have been prescribed and pointed out for them by statute;"
>
> "Language granting constitutional powers is liberally construed to effectuate its purposes, and the same rule applies to limitations, for the true spirit of Constitutional interpretation in both directions is to give full, liberal construction to the language, aiming ever to show fidelity to the spirit and purpose." *Fairbanks v. United States,* 181 U. S. 283, 289.

It will be conceded that the acts charged in the bill of indictment against the defendants were crimes *mala prohibita* and not *mala in se*. This being true, it would seem that the strict construction which the government desires in this matter should not be given as the offense charged against the defendants was never a crime in this country until January 16th, 1920, and by the voice of the people it ceased to be a crime December 5, 1933, and, therefore, there was no element of great moral turpitude involved in the offense charged against the defendants, it being only a crime by virtue of the will of the people.

4.

REPLY TO POINT THREE OF THE GOVERNMENT'S BRIEF IN REFERENCE TO DECISIONS INVOLVING CHANGES FROM TERRITORIAL TO STATE GOVERNMENTS INDICATE THAT THE COURTS STILL HAVE POWER OVER NATIONAL PROHIBITION ACT VIOLATIONS.

The defendants do not think the argument presented under Point Three of the government's Brief applicable to the instant case for the reason that there was an enabling statute which transferred the jurisdiction from the Courts of the territory to the Courts of the new state and, therefore, does not deal with the repeal of any law. Indeed, the only time that this situation has been presented whereby a law was repealed is the case of *Moore v. U. S.*, 85 Fed. 465, which is cited in the opinion of the Circuit Court of Appeals for the Ninth Circuit in *Green v. U. S., supra.*

CONCLUSION.

Taking the argument of the government as outlined in its Brief, as we construe it, that unless Section 13 saves them, the ruling of the court below is correct, and that section applying only to a statute or congressional enactment, that has been repealed, and this case involving a constitutional amendment and the National Prohibition Act still being applicable to certain possessions of the United States, but obsolete and inoperative as to the Forty-eight states, it follows that the ruling of the Court below was correct and the judgment in this case should be affirmed.

Respectfully submitted,

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